LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 11 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-645

JIMMY T. SMITH, an Individual, and SMITH SALES COMPANY, a Corporation,
Petitioners

vs.

SCRIVNER-BOOGAART, INC., a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STAN P. DOYLE
P. O. Box 4470
Tulsa, Oklahoma 74104

RICHARD E. HANCOCK
Tulsa, Oklahoma
Attorneys for Petitioner

Of Counsel:

DOYLE & HOLMES
P. O. Box 4470
Tulsa, Oklahoma 74104

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Citations to Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions 3

Statement of the Case 3

1. The Facts 3

2. Proceedings Below 9

Reasons for Granting the Writ—

I. This Writ Should Be Granted for the Reason That the Tenth Circuit Has Decided a Federal Question in a Way in Direct Conflict with Applicable Decisions of This Court 10

II. This Writ Should Issue for the Reason That the Trial Court So Departed from the Accepted and Usual Course of Judicial Proceedings for Antitrust Cases As to Call for an Exercise of This Court's Power of Supervision 16

Conclusion 21

Appendix—

Appendix A—Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Oklahoma (R 73) A1

Appendix B—Opinion of the Court of Appeals, Tenth Circuit A3

Appendix C—Order Denying Petition for Rehearing.. A12

Appendix D—Relevant Statutes A13

Table of Authorities

CASES

Atlantic Refining Co. v. *FTC*, 381 U.S. 357 (1965) 13

Bigelow v. *RKO Pictures, Inc.*, 327 U.S. 251 (1946) 17, 19

Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969) 13, 14

FTC v. *Brown Shoe Co.*, 384 U.S. 316 (1966) 13

FTC v. *Texaco, Inc.*, 393 U.S. 223 (1968) 13, 14

International Business Machines v. *United States*, 298 U.S. 131 (1936) 13

International Salt Co., Inc. v. *United States*, 332 U.S. 392 (1947) 13

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 16

Northern Pacific Ry. v. *United States*, 356 U.S. 1 (1958) 13

Standard Oil Co. of Calif. v. *United States*, 337 U.S. 293 (1949) 13

Standard Oil Co. v. *United States*, 221 U.S. 1, 83-84 (1911) 12

Tampa Electric Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961) 15, 21

United States v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) 16

United States v. *Arnold Schwinn Co.*, 388 U.S. 365 (1967) 13

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) 17

United States v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940) 20

United States v. *Topco Associates, Inc.*, 319 F.Supp. 1031 (N.D.Ill. 1970), 91 S.Ct. 1374 (1971) 12

United States v. *Trenton Potteries*, 273 U.S. 392 (1927) 17, 21

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 89 S.Ct. 1562 (1969) 15, 17

TEXTS AND STATUTES

21 Cong. Rec. 2598 (1890) 12
55 Cornell L. Pev. 161, 162-163 (1970) 14
Handler, Antitrust: 1969 14
P. Areeda, Antitrust Analysis, 45 (1967) 17
15 U.S.C. Section 1 3
15 U.S.C. Section 14 ..... 3, 9
15 U.S.C. Section 15 ..... 3, 9
15 U.S.C. Section 22 ..... 3, 9
15 U.S.C. Section 26 ..... 3, 9
28 U.S.C. Section 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

JIMMY T. SMITH, an Individual, and SMITH SALES COMPANY, a Corporation,
Petitioners,

vs.

SCRIVNER-BOOGAART, INC., a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on June 21, 1971. Petition for Rehearing was denied on October 22, 1971.

CITATIONS TO OPINIONS BELOW

No opinion was written by the District Court in this case. The Findings of Fact and Conclusions of Law, entered on March 26, 1970 by the District Court, is unreported (R* 73a) and is printed in Appendix "A" hereto, *infra*, App. A, A1. The opinion of the Tenth Circuit filed June 21, 1971, affirming the judgment of the District Court is reported at 1971 CCH Trade Cases par. 73,611. (App. B, A3).

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on June 21, 1971. Petition for Rehearing, filed by Petitioner on July 2, 1971, was denied by the Circuit Court on October 22, 1971. (App. C, A12). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether, under Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Act, a written and executed contract under which independent grocery retailers are expressly required to buy goods, wares and other commodities exclusively from a named grocery wholesaler is illegal per se when the contract is standing alone or is considered in light of the further contractual requirement that the independent retailers participate in certain defined services performed by the wholesaler including an advertising program that involves admitted price fixing?

---

*References to pages of the record certified to this Court by the Clerk, United States Court of Appeals for the Tenth Circuit, will be to the two volumes of Appendix of Petitioner filed in the Tenth Circuit and will be designated by "R" followed by the appropriate page numbers in said Appendix.

2. Whether the trial court so departed from the accepted and usual course of judicial proceedings in antitrust cases by permitting the defendant-Respondent to introduce evidence to justify anticompetitive practices; by commenting on the evidence of plaintiff-Petitioner concerning the proof of damages; by its instructions concerning the proof of damages; by refusing to issue instructions that practices of Respondent were illegal per se; and by allowing the jury to pass on the ultimate issue of liability?

STATUTORY PROVISIONS

Statutes involved in this case are as follows: Section 1 of the Sherman Antitrust Act, 15 U.S.C. sec. 1; Section 3 of the Clayton Act, 15 U.S.C. sec. 14; Section 4 of the Clayton Act, 15 U.S.C. sec. 15; Section 12 of the Clayton Act, 15 U.S.C. sec. 22; and Section 16 of the Clayton Act, 15 U.S.C. sec. 26. The foregoing statutes are printed in Appendix "D", *infra*, App. D, A13.

STATEMENT OF THE CASE

1. The Facts

Petitioners own and operate a small independent wholesale business that sells principally to retail grocery stores a line of automotive accessories and supplies such as motor oil, antifreeze, car wax, oil filters, and similar items. Jimmy T. Smith started this small independent business in 1965, and incorporated it on October 28, 1966. Working as his own salesman, sometimes his own truck driver, Smith[1] has experienced a steady growth in his business. (R 186).

---

1. References to the Petitioners in this Petition will be in the singular. For the sake of clarity, references will be either to the "petitioner" or to "Smith."

Gross sales during his first year, 1966, were approximately $119,000 (R 185-186)—increasing to about $447,000 for 1969. The largest portion, 65% to 75%, of these sales were made to retail grocery stores. (R 191). Smith became aware of the great potential of this market for the sale of automotive supplies from his long experience in the grocery wholesale business. (R 185). He knew that many people serviced their own automobiles and that these persons would buy motor oil, oil filters and the like, if available, at their grocery store.

Smith's single largest customer is Warehouse Markets, a chain of grocery stores operating in the State of Oklahoma. From Smith, the Warehouse Markets stores purchased about $98,000 of automotive supplies, during 1966; and $226,650 during 1969. (R II 58). Smith's second largest customer is another grocery chain—the Red Bud Stores, independent stores operating under the trade name owned by Respondent. Although comparable in size, location and customer type to Warehouse Markets, Smith's total sales to the Red Bud Stores have, however, been much lower. (R II 58, pl. exhibit 21). In 1969, Smith sold $226,650 to Warehouse Markets; he sold only $23,017 to the Red Bud Stores. One reason for this difference is that the Red Bud Stores, even though many of them are independently owned, are obligated by contract to buy from the Respondent, Scrivner-Boogaart. This contract is the subject of this suit.

Scrivner-Boogaart, a large integrated grocery company, manufactures, wholesales and retails grocery items. Operating in several States and supplying some 120 retail outlets from a stock of 8,000 items, Scrivner-Boogaart, for the fiscal year ending June 30, 1969, had gross sales of approximately $110,000,000 of which about $60,000,000 was attributable to sales in Oklahoma. (R 77-78).

At the retail level, Scrivner-Boogaart owns and operates Red Bud Stores; in the Tulsa, Oklahoma area, the principal trade area of Smith, Scrivner-Boogaart owned 4 stores either in whole or in part. Other Red Bud stores are independently owned and operated under the Scrivner-Boogaart trade name. Twenty-five (25) of these independently owned stores operate under a sublease agreement which includes a standard clause requiring the independent retailer to purchase from Scrivner-Boogaart an amount equal to 65% of the retailers' total monthly net sales and to participate in certain dealer services performed by Scrivner-Boogaart. This standard clause found in the twenty-five (25) subleases is as follows:

XVII

SERVICES AND REQUIREMENTS

> Sub-Lessee shall participate in all dealer services and programs provided by Sub-Lessor, including, but not limited to, store accounting service, Red Bud advertising, frozen food plan, sign rental and store remittance service. During the term of this Sub-Lease Contract and any extensions or renewals thereof, Sub-Lessee shall purchase from Sub-Lessor, each month, so much of Sub-Lessee's merchandise requirements, including dry groceries, health and beauty aids, frozen foods, fresh produce, fresh and cured meats and other items purchased for resale, as shall equal, in dollar volume, sixty-five per cent (65%) of Sub-Lessee's total monthly net sales. If Sub-Lessee violates any of the provisions of this paragraph, Sub-Lessor, at its option, may cancel and terminate this Sub-Lease Contract.

Scrivner-Boogaart finds persons to enter into a sublease agreement with this restrictive clause by financing the opening of the retail outlet. After locating the premises, Scrivner-Boogaart installs the fixtures and equipment,

and stocks the store with inventory. Two agreements are executed by the sublessee: The standard sublease and a security agreement which provides in the opening paragraph that:

> "Owner desires to borrow money from Scrivner and for the purpose of inducing Scrivner to make such loan, Owner desires to enter into this agreement." (R II 34).

One of the conditions is that so long as any portion of the indebtedness remains unpaid, the sublessee will purchase from Scrivner-Boogaart *"all of the Owner's merchandise requirements,* including dry groceries, produce, health and beauty aids, frozen foods, meats and other items purchased for resale." (R II 34) (emphasis added).

Under the sublease, the independent dealer must buy from Scrivner-Boogaart an amount equal to 65% of the retailers' monthly net sales. Considering the grocery mark-up at about 20% (R 84), the sublessee is obligated to buy about 80% of his merchandise requirements from Scrivner-Boogaart. Whatever freedom is left to the independent retailer operating under a restrictive sublease must be used to purchase those items that Scrivner-Boogaart does not stock—such as beer, soda pop, crackers, cookies, and bread. (R 79). Scrivner-Boogaart stocks the produce sold by the Petitioner, Smith. (R II 46).

There is little, if any, room for the independent retailer restricted by one of the twenty-five (25) Scrivner-Boogaart subleases to buy automotive supplies from Smith. If a retailer did buy from Smith, that retailer would also become obligated to buy from Scrivner-Boogaart an amount equal to 65% of what the retailer received from the sale of Smith products. To buy from Smith, an independent retailer obligated to Scrivner-Boogaart must violate the contract. But if the restrictive clause is violated, the sublease can be

terminated; the entire indebtedness can become due; and Scrivner-Boogaart gains the right to foreclose the security agreement and take possession of the store. (R II 18, 35).

The independent grocery retail outlets operating under one of the restrictive subleases must also agree to participate in Scrivner-Boogaart's accounting services (R II 18), meaning that Scrivner-Boogaart, the supplier, does the accounting for the independent retail outlets. And for this service, Scrivner-Boogaart charges the retailer about $60.00 per month. (R 87-88). Through this accounting service, Scrivner-Boogaart can keep a close check on the retailer.

Smith, nonetheless, was able to sell to a few of the independent Red Bud stores. (R II 58). During his first full year, 1966, Smith sold automotive supplies to three of the Red Bud stores. (R II 58). However, Scrivner-Boogaart issued direct warnings to these stores that they were in violation on contractual obligations. On November 11, 1966, Scrivner-Boogaart, in a letter sent to the owner of one of the Red Bud stores buying from Smith, wrote:

> "Paragraph XVII of the Sublease Contract, dated July 2, 1963 between Scrivner-Stevens Company and Fred Latham, Jr., provides." (Whereupon the Sublease Agreement, paragraph XVII was set forth in full.) "It has come to our attention that you have been violating this provision by failing to purchase from this company all of the requirements for sale upon the sub-leased premises." (R II 30).

The owner was then informed that if he continued to fail to comply, the sublease would be terminated.

On December 6, 1966, Scrivner-Boogaart sent a letter to the sublessee of another Red Bud store and gave notification that the sublease was terminated and that the security agreement would be foreclosed. (R II 32). On the same date, Scrivner-Boogaart filed legal action in

the Oklahoma State Courts to foreclose the security agreement. (R 164-165). As a result of this foreclosure, all independent wholesalers in competition with Scrivner-Boogaart who had sold merchandise to this store on credit suffered a direct loss. Concerning this loss to creditors, Roy Brandell, then Treasurer of Scrivner-Boogaart, declared that those creditors could "go to hell". (R 180, 248).

Smith had extended credit to this Red Bud store, and at the time of the Scrivner-Boogaart foreclosure, the store owed Smith $884.01. (R II 47). Since the foreclosed store was incorporated the debt was uncollectable. Scrivner-Boogaart, subsequent to this termination, subleased another store to this same operator. The reasonable inference that can be drawn from these facts is that Scrivner-Boogaart by foreclosing the security agreement was actually seeking to apply pressure on the competing wholesalers such as Smith—to keep him and other independent wholesalers from selling to the Scrivner sublessees.

Scrivner-Boogaart describes its merchandising plan as the "total program concept." (R 144). This was explained to mean that all the grocery wholesalers, engaged in the same type of plan, furnish everything for their respective stores. Scrivner-Boogaart will call on a store serviced by a competing wholesaler but not for the purpose of selling to that store any products. Testimony indicated that Scrivner-Boogaart would call on these other stores only for the purpose of bringing them into the total program—where they will buy their goods from Scrivner-Boogaart only and will participate in the services provided by Scrivner-Boogaart. (R 144-145, 154-155).

Besides the accounting services that permit Scrivner-Boogaart to keep its eye on the performance of its customers, the stores operating under one of the restrictive

subleases are obligated to participate in the Scrivner-Boogaart advertising program. Part of this program involves a weekly meeting attended by one representative of each of the retail stores and a representative (field counselor) of Scrivner-Boogaart who acts as the coordinator of the group. (R 89, 148).

The admitted purpose of these weekly meetings was to "select the price" (R 148) finally agreed upon by the representatives of the retail stores that would be placed in the weekly newspaper ad.

2. Proceedings Below

Smith filed suit to challenge the legality of the Scrivner-Boogaart practices on August 16, 1967, and sought damages and injunctive relief under Section 4 (15 U.S.C. sec. 15) (App. D, A14) and Section 16 of the Clayton Act. (15 U.S.C. sec. 26) (App. D, A15). Respondent is charged with a violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. The District Court for the Northern District of Oklahoma, in which court the complaint was filed, had proper jurisdiction and venue according to Section 4 of the Clayton Act and Section 12 of the Clayton Act. (15 U.S.C. sec. 22) (App. D, A14, A15).

Petitioner-plaintiff, after preliminary discovery, filed a motion for summary judgment on April 22, 1968. Respondent-defendant had filed a motion for summary judgment on April 2, 1968. Both motions were denied by the trial court on May 9, 1969.[2] The case was tried before a jury on March 10-12, 1970 which returned a verdict in favor of the defendant in the following form:

---

2. The long delay in ruling on the motions for summary judgment was due to the illness of the trial judge.

> "We the jury, find that the defendant did not violate Section 1 of the Sherman Act and find for the defendant."
>
> "We the jury, find that the defendant did not violate Section 3 of the Clayton Anti-Trust Act and find for the defendant." (R 300).

Findings of fact and conclusions of law, prepared by defendant, were filed March 26, 1970. The District Court adopted the conclusion of the jury in denying injunctive relief to the plaintiff—the order was filed March 30, 1970. (App. A, A1, A2).

Notice of appeal was filed by plaintiff on March 19, 1970 with a supplemental notice of appeal filed by plaintiff on April 8, 1970. Briefs were filed by both parties and the case was argued before the Tenth Circuit in March 1971. On June 21, 1971, the Tenth Circuit affirmed the judgment below, and on October 22, 1971, plaintiff's petition for rehearing was denied. (App. C, A12). This Petition was then filed.

REASONS FOR GRANTING THE WRIT

I. This Writ Should Be Granted for the Reason That the Tenth Circuit Has Decided a Federal Question in a Way in Direct Conflict with Applicable Decisions of This Court.

The Tenth Circuit decision in this case, if allowed to stand as the law of that Circuit, will have the immediate effect of completely foreclosing the Petitioner from a significant share of the retail grocery market. With this opinion, the obvious anticompetitive practices of Scrivner-Boogaart become the legally accepted way for all grocery wholesalers. The item by item competition will be replaced by some form of competition among full line grocery wholesalers for the right to become the exclusive supplier of independent grocery retailers.

As a single line company, the Petitioner who sells automotive supplies to retail grocery stores and does not offer a complete program can never hope to compete with Scrivner-Boogaart and the other large grocery wholesalers even in a single line of commerce. Neither can the man who sells eggs or produce or other single line items. The hope of preserving the small businessman in our economy has been destroyed by the Tenth Circuit opinion. We are left with a market that is divided among the full line companies.[3]

Scrivner-Boogaart had at the time of the trial 25 independent grocery retailers in the State of Oklahoma obligated to buy exclusively to the extent of the 65% provision in the subleases. The other grocery wholesale companies were engaged in this same exclusionary practice. That this practice is prevalent in the food industry makes the matter even more critical. Where the necessaries of life are involved, our courts must be much more sensitive to the antitrust implications. Under the plan defended by Scrivner-Boogaart and upheld by the Tenth Circuit, the price for food and other grocery items is determined by the few men who control the grocery wholesale businesses.

The natural consequences of the Scrivner-Boogaart business scheme should be considered in light of the views expressed when Congress was considering the need for the Sherman Act. Senator George declared that:

> "It is a sad thought . . . that the present system of production and of exchange is having that tendency

---

3. A "full line company" as used herein refers to the type of program offered by Scrivner under which a retailer buys his merchandise from and participates in services offered by wholesaler.

> which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises." 21 Cong. Rec. 2598 (1890).

Commenting on this same period of American history, Justice Harlan observed that: in 1890 there was a deep feeling of unrest. The fear was that another kind of slavery would be fastened on the American People, "namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the *production and sale of the necessaries of life.*" *Standard Oil Co.* v. *United States*, 221 U.S. 1, 83-84 (1911) (concurring and dissenting opinion) (emphasis added).

Of all the areas of our economy, it is most important that free competition be vigorously enforced and preserved in the grocery industry. When free competition fails in this area, the entire consuming public, the rich as well as the poor, suffers. Until we are willing to accept permanent controls on the price for food and other items purchased in a grocery store, the only force to keep prices down is free competition.

There is a significant need for this Court's power of supervision if free competition is to return to the food industry. Probable jurisdiction has already been noted in the case, *United States* v. *Topco Associates, Inc.*, 319 F.Supp. 1031 (N.D.Ill. 1970), 91 S.Ct. 1374 (1971). *Topco* and the present case are similar in that each involves restrictions imposed on independent grocery retailers which restrictions are alleged to be illegal per se. The dissimilarity is in the nature of the restraints with the Scrivner-Boogaart restrictions being far more pernicious and without any redeeming virtues. Together, the two cases will furnish to this Court a broad over-view of the type of restrictions imposed on independent grocery retail outlets.

This Court has, of course, already made its position fairly clear about the restraints in the nature of tying agreements or exclusive dealing arrangements that restrict the freedom of independent retailers or purchasers. Petitioner with his challenge to the legality of practices of Scrivner-Boogaart was relying on the teachings of: *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC* v. *Texaco, Inc.*, 393 U.S. 223 (1968); *International Business Machines* v. *United States*, 298 U.S. 131 (1936); *International Salt Co., Inc.* v. *United States*, 332 U.S. 392 (1947); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1 (1958); *Standard Oil Co. of Calif.* v. *United States*, 337 U.S. 293 (1949); and *United States* v. *Arnold Schwinn Co.*, 388 U.S. 365 (1967).

How stable is our system of jurisprudence if small businessmen, such as Smith, are unable to rely upon the precedent of this high Court. These small businessmen do not have available to them any self help measure that is associated with economic power. Without the confidence that the decisions of this Court will be followed by lower courts, the only alternative is for the small businessman to accept his foreclosure from those markets preempted by the large corporations that can offer a total program and that can obligate the independent retailer by contracts such as those used by Scrivner-Boogaart. The incentive to reach out and exert the efforts of imagination of the individual who desires to start and build new businesses will eventually be destroyed. Smith does not ask for any advantages; he seeks only the right to compete with whomever is in the market.

Following the teachings of this Court as expressed in the controlling opinions, Smith has satisfied his burden

of proof that the practices of Scrivner-Boogaart were illegal under the antitrust laws. Proof of dominance as the Petitioner understands it is required only to show that the defendant was capable of restraining commerce in a not insubstantial amount. The existence of 25 restrictive subleases that obligated independent retailers to buy from Scrivner-Boogaart is a fact from which the lower courts could have inferred dominance. Handler, Antitrust: 1969, 55 Cornell L. Rev. 161, 162-163 (1970).

There was, however, much more evidence than the mere existence of the contracts. The relationship of Scrivner-Boogaart to the sublessees was banker, supplier and landlord. *FTC* v. *Texaco,* 393 U.S. 223 (1968). This was power in the hands of Scrivner-Boogaart. With the additional power to terminate the business of an independent retailer, a power that Scrivner-Boogaart did in fact use, there was dominance.

Petitioner likewise proved that the amount of commerce foreclosed by Scrivner-Boogaart was not insubstantial. Perhaps from the record of this case, this Court cannot tell with mathematical certainty how much commerce was foreclosed; however, there is sufficient proof to satisfy the burden placed on treble damage plaintiffs. Petitioner does not understand that his burden is to prove the amount of commerce foreclosed in terms of mathematical certainty.

Scrivner-Boogaart had 25 independent retail grocery stores under a restrictive sublease. Three of these sublease stores that operated in Tulsa, Oklahoma had total sales in 1969 of $4,027,737. (R II 60). This is proof enough that the amount of commerce foreclosed was not insubstantial. In the *Fortner* case, this Court said that $200,000 of a market foreclosed by a tying arrangement cannot be considered "paltry or insubstantial."

Even though this Court has long recognized the importance of private antitrust litigants and has directed trial and appellate courts to observe the practical limits of the burden of proof, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 89 S.Ct. 1562, 1576 (1969), the Tenth Circuit imposed upon the Petitioner the onerous burden expressed in terms of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961). If this case is ever allowed to control and make legitimate the exclusionary practices of Scrivner-Boogaart, the very foundation of the concept of free competition will be destroyed.

Tampa Electric must be limited to the facts of that case. A comparison of that case with the present situation will illustrate an extreme degree of difference. Tampa Electric was a public utility company subject to state regulations as to rates and practices. Scrivner-Boogaart on the other hand is a private company operating within the free competitive market; there are no public regulations that control the prices charged by Scrivner-Boogaart. In *Tampa Electric*, the alleged restraint on competition involved a single seller; a single buyer; and a single contract. The practices of Scrivner involved many buyers; the anticompetitive device of Scrivner involved an almost complete line of grocery store products; and by its very nature, the Scrivner restrictive sublease was anticompetitive.

The lower courts failed to see the real anticompetitive impact of the practices of Scrivner-Boogaart because the Petitioner was so much smaller than Scrivner-Boogaart. It was noted by the Tenth Circuit that the Red Bud stores stocked only 1% of their total inventory in automotive accessories; that Scrivner-Boogaart had only 4 stores in the Tulsa area under a restrictive lease; and that out of 8,000 items stocked by Scrivner-Boogaart, only 14 were in the

automotive supply line. The conclusion was that the competitive impact was de minimus.

This means that a large company such as Scrivner-Boogaart can eliminate competition item by item or company by company until there is total destruction of free competition. In terms of value, salt must be an insignificant item in a grocery store; however, to protect the concept of free competition even this single item would have to be protected. The converse is also true. If Smith is allowed entry into the retail grocery market by having the Scrivner-Boogaart sublease declared illegal, the door to free competition is open for all small independent suppliers who handle a single line of products.

This Court has long recognized that the antitrust laws were passed by Congress "to perpetuate and preserve for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States* v. *Aluminum Company of America*, 148 F.2d 416, 429 (2d Cir. 1945). Recognizing this basic Congressional purpose, this Court has ruled that the foreclosure from a market of even a small company could not be justified on the ground that the effect on competition was de minimus. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

The departure from accepted precedent has been so great in this case that the supervision of this Court is vitally needed.

II. This Writ Should Issue for the Reason That the Trial Court So Departed from the Accepted and Usual Course of Judicial Proceedings for Antitrust Cases As to Call for an Exercise of This Court's Power of Supervision.

Trial judges, in antitrust cases, carry an extremely heavy burden and responsibility, for seldom is the ultimate

decision limited to the parties involved in the litigation. Private antitrust plaintiffs insure an effective and vigorous enforcement of those laws designed to preserve the concept of free competition. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 89 S.Ct. 1562, 1576-77 (1969); *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251 (1946).

Effective enforcement of these laws requires that the trial courts retain control over all the legal issues involved. In a footnote to this Court's opinion in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964), the responsibility of the trial judge was reviewed through a quote from a speech made by Judge J. Skelly Wright:

> "Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules."

Judicial control of the legal issues was not maintained by the trial judge in the present case. Though the trial of the case was before a jury the trial judge is not relieved of any responsibility. In fact the judicial burden might even increase when a jury is involved. As Professor Areeda has observed: "The layman's judgment has little relevance to antitrust policy." P. Areeda, Antitrust Analysis, 45 (1967). Instructions given to the jury and approved by this Court in *United States* v. *Trenton Potteries*, 273 U.S. 392 (1927), was that the duty of the jury was to determine if there existed a price fixing agreement—not to determine if the agreement was reasonable and thus legal. *Id.* at 395.

There were no facts for the jury to determine in the present case; its role should have been limited to the determination of the amount of injury suffered by Petitioner as a result of Scrivner-Boogaart's antitrust violation.

Prior to the trial, the parties had stipulated in a pre-trial hearing that Scrivner-Boogaart held subleases that obligated the retail grocery store to buy from Scrivner to the extent of the 65% provision. (R 68). It was further admitted by Scrivner that the dealer services in which the Sublessee was obligated to participate did exist. (R 68). It was undisputed that Scrivner-Boogaart had, at the time of the trial, 25 independent stores obligated through a sublease agreement. It was undisputed that Scrivner-Boogaart had sent warning letters to stores that failed to buy the required amount from Scrivner. It was undisputed that Scrivner-Boogaart actually terminated a sublease and foreclosed a security agreement because the owner had breached his promise to buy from Scrivner-Boogaart. And it was undisputed that the stores operating under the trade name owned by Scrivner-Boogaart, including those stores independently owned and those retail stores owned by Scrivner, sent a representative to a weekly meeting attended by a representative of Scrivner-Boogaart to discuss and set prices. There were other facts admitted to be beyond dispute which have been covered in other parts of this Petition.

With a record of undisputed facts, there was nothing relating to the legality of the agreement that had to be decided by a jury. Had the trial court followed the teachings of this Court that have through many written opinions been clearly articulated, it would have decided the question of law independent of the jury. Instead of maintaining control of the legal issue, the trial judge submitted the general question of liability to the jury which returned the verdict that: we the jury, find that the defendant did not violate the specified sections of the antitrust laws. (R 300).

Very little room was left for the jury to return a verdict for the plaintiff. Evidence introduced by the plaintiff

to prove the extent of his injury was effectively eliminated by a combination of the judge's comments during the trial and his subsequent instructions to the jury. The specific item of damages ($884.01) shown by the plaintiff to have been a loss incurred when Scrivner-Boogaart terminated one of the subleases was excluded from any consideration by instruction of the judge. (R 291). Other than this special item of damages, the plaintiff had sought to prove his injury resulting from Scrivner's antitrust violation through a market comparison of the Warehouse Markets and the Red Bud Stores. These two similar markets were compared in several different ways: size, location, customer type, and sales made by Smith to each. (R 200-205). On the basis of this comparison, Smith estimated the amount of profit lost as a result of the Scrivner-Boogaart restrictive subleases.

Scrivner-Boogaart objected to the introduction of this comparison of markets on the grounds that it was highly speculative. In its trial brief submitted to the trial court, Scrivner-Boogaart had conceded that a comparison of markets was the proper way for the assessment of damages. (R 62). The trial court did not sustain the objection about this market comparison; however, it did state that: "It is highly speculative but I will tell the jury that it is." (R 202). Combined with the instruction (which if standing alone would not be an improper instruction) that the jury will disregard all evidence which is speculative, the trial judge's comment on the market comparison excluded that evidence from which a jury might have been otherwise able to draw a reasonable inference. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

Even if the plaintiff had failed in his proof of damages, he certainly faced a threatened loss just as long as the exclusionary contracts of Scrivner-Boogaart were allowed to remain in effect. The jury, however, was allowed to

find that the contracts did not violate the antitrust laws, and the trial judge adopted this conclusion in denying injunctive relief. Because the jury was permitted by the trial judge to consider subjective reasons offered by Scrivner-Boogaart to show why the restrictive subleases should not be held illegal, the jury was cast into a role of trying to second guess Congress's reasons for passing the antitrust laws. Scrivner-Boogaart offered a list of 26 subjective advantages of the subleases. (R II 80-81). The list actually shows the anticompetitive features of the subleases. One of the justifying reasons offered and considered by the jury was:

> "Elimination of salesmen—which allows the owner time to manage and to greet his customers." (R II 81).

The elimination of salesmen is accomplished by the fact that the independent grocery retailer is obligated to buy from Scrivner-Boogaart. But the elimination of salesmen means that free competition has also been eliminated.

Petitioner believes that this Court has rejected the justifying arguments submitted by Scrivner-Boogaart. *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940). The Tenth Circuit, by sanctioning the use of these subjective justifications, has granted to Scrivner-Boogaart the power to decide which companies will be permitted to sell to independent grocery retail stores. Such important decisions should not be made by any individual who holds the economic power of Scrivner-Boogaart. The more reliable force for a determination of who shall have entry into a market is free competition.

The advantages of the Scrivner-Boogaart restrictive subleases belong only to Scrivner-Boogaart. If there are advantages to anybody else, the advantages are at most

tenuous. If Scrivner-Boogaart can give any advantage to others, they can be taken away at the whim of Scrivner-Boogaart. As noted by this Court in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927): power reasonably exercised today may become power unreasonably exercised tomorrow.

CONCLUSION

If the small businessmen of this country are not to be eliminated, trial courts must not construct insurmountable obstacles to private antitrust suits. This case was filed on August 16, 1967, and the Petitioner, with his very limited resources, is still trying to obtain the relief that would allow him to compete with Scrivner-Boogaart in the retail grocery market. Unless the Scrivner-Boogaart subleases are declared illegal, the Petitioner is foreclosed from virtually all of the retail grocery market.

No clarification of the law is necessary in this case unless it would be to expressly restrict the *Tampa Electric* opinion. This Court through many recent decisions has made its position clear. What is needed in this case, therefore, is some direction from the Court that the applicable opinions be followed. The practices of Scrivner-Boogaart should be declared illegal per se by this Court and the case should be remanded with direction for the lower court to issue injunctive relief and to allow the Petitioner an opportunity to prove his damages.

That this Court's supervisory power can be applied, it is urged that this writ be granted.

Respectfully submitted,

STAN P. DOYLE
P. O. Box 4470
Tulsa, Oklahoma 74104

APPENDIX "A"—FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (R 73)

(Filed March 26, 1970)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIMMY T. SMITH, an individual and SMITH SALES CO., a corporation,
Plaintiffs,
vs.
SCRIVNER-BOOGAART, INC., a corporation,
Defendant.
} 67-C-153

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The minute order and judgment of this Court, entered March 13, 1969, denying the plaintiffs' prayer for injunctive relief in the instant case is hereby amplified and amended to include the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Court finds, concurs and adopts the finding of the jury that there has, as a matter of fact, been no violation of either Section I of the Sherman Antitrust Act or Section III of the Clayton Act by the defendant, and that there was no unreasonable restraint of trade or commerce caused by the defendant.

That the plaintiffs' evidence did not establish a per se violation of either Section I of the Sherman Act or Section III of the Clayton Act.

That the plaintiffs herein failed to prove any damage unto themselves or threat of damage by virtue of any act of the defendant.

CONCLUSIONS OF LAW

That there has, as a matter of law, been no showing by the plaintiffs of any violation of the Federal Antitrust Laws nor any threatened breach of the same by the defendant such as to entitle the plaintiffs to an injunction against the defendant as prayed in the plaintiffs' complaint, and the same should, therefore, be denied. The prayer for injunctive relief is hereby denied.

ENTERED this 26 day of March, 1970.

s/ Allen E. Barrow
United States District Judge

APPENDIX "B"—OPINION OF THE COURT OF APPEALS, TENTH CIRCUIT

1971 CCH Trade Cases, [¶ 73,611] Jimmy T. Smith and Smith Sales Co. v. Scrivner-Boogaart, Inc.

U. S. Court of Appeals, Tenth Circuit, May Term, 1971. No. 322-70. Filed June 21, 1971. Appeal from U. S. District Court, Northern District of Oklahoma (District Court No. 67-C-153).

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 322-70

JIMMY T. SMITH, an Individual, and SMITH SALES CO., a Corporation,
Appellants,

vs.

SCRIVNER-BOOGAART, INC., a Corporation,
Appellee.

Sherman Act

Tying—Subleases—Financing—Control of Tying Product—Effect on Commerce.— A jury finding that a wholesaler of automotive accessories failed to show that one of its competitors imposed illegal tying agreements on its lessee retailers, was upheld. The lease, assertedly the tying product, includes a standard clause that requires the retailer to purchase from the wholesaler 65% of the retailer's total monthly net sales and to participate in cer-

tain dealer services rendered by the wholesaler. The complaining wholesaler did not meet the burden of his case under FORTNER ENTERPRISES, 1969 Trade Cases ¶ 72,757. He did not show that his competitor had the requisite dominance or control over the tying product and that the effect of the tying arrangement was not insubstantial. For example, there were only four of the challenged sublease agreements in effect in the area of competition in a market that had over 400 stores; out of the 8000 items in the challenged wholesaler's line only 14 were in the automobile accessory area. In addition, the court did not err in submitting the question to the jury. See ¶ 2930.45.

Exclusive Dealing—Subleases—Effect on Commerce. — A jury finding that a wholesaler of automotive accessories failed to show that one of its competitors imposed illegal exclusive dealing contracts on retailers was upheld. The exclusive dealing arrangement must be likely to foreclose competition in a substantial portion of the line of commerce affected. The evidence presented by the complaining party was not sufficient to warrant a finding of a *per se* illegal exclusive dealing contract. See ¶ 2910.

For appellants: Stan P. Doyle and Richard E. Hancock, Tulsa, Okla. For appellee: Jack R. Givens, Tulsa, Okla.

Before CLARK,* Associate Justice; SETH and HOLLOWAY, Circuit Judges.

CLARK, Associate Justice: This appeal seeks to overturn a jury verdict in an antitrust suit involving alleged violations of Section 1 of the Sherman Act and Sections 3 and 16 of the Clayton Act. Specifically, Jimmy T. Smith

---

*Associate Justice, United States Supreme Court, Retired, sitting by designation.

and Smith Sales Company, a corporation, appellants, wholesalers of automotive accessories, chemicals, etc. claim that Scrivner-Boogaart, Inc., a corporation, appellee, a wholesale-retail grocer and manufacturer is guilty of a *per se* violation of the antitrust laws in that it exacted agreements from appellants requiring them to purchase so much of appellants' merchandise requirements for resale as shall equal in dollar volume 65 percent of their monthly sales; that, in any event, the agreements were an unreasonable restraint of trade or commerce under § 1 of the Sherman Act; that the form of the verdict as submitted to the jury was erroneous in that it called solely for the legal conclusion of the jury as to whether appellee violated the antitrust laws of the United States; and, finally, that the rulings of the trial judge excluding certain evidence as to damages were erroneous and his refusal to instruct that the agreements were a *per se* violation of the antitrust laws was invalid. We have carefully studied the entire record and have been unable to find support for appellants' claims as to violations of the antitrust laws and therefore affirm the judgment without reaching the issue of damages.

I.

Background of the Parties and the Market:

The appellants began business in 1965 in Oklahoma in the wholesaling of a line of about 400 items of automotive accessories, automobile additives, chemicals, major brands of motor oil, oil filters, tools, charcoal, charcoal lighters and sunglasses. Appellants serviced the Tulsa area, primarily, with some sales in Picher and Oklahoma City, Oklahoma. Their customers included service stations, automobile garages, discount houses and retail grocery concerns. The latter made up 65 percent to 75 percent of their total sales, which in 1966 were $119,000,

but by 1969 had reached $447,000 with gross profits of $56,519. Appellant's largest customer was Warehouse Markets, a chain of 15 stores, with gross purchases from appellants of $226,650 in 1969. Red Bud Stores was their number two customer with $23,017 in 1969 although the appellee was its primary supplier. Appellants contend that this wide disparity in its sales to Warehouse Markets and Red Bud is due to an illegal tying and exclusive dealing arrangement between Red Bud and appellee. However, Red Bud only stocked 1 percent of their total inventory in the automotive and accessory line.

The appellee is an integrated manufacturing and wholesale-retail concern that handles some 8000 items in the grocery and affiliated lines. Fourteen of these are in the automobile accessory line which is in competition with appellants. While the record does not show the amount of sales of appellee in the automobile accessory line, we do know that its total sales in all 8000 items approximates $110,000,000 annually to some 120 stores in Oklahoma, Texas, Arkansas, Nebraska and South Dakota. Some $60 million of this total is sold in Oklahoma. The relevant market in which appellant operates is Tulsa and its vicinity where there are over 400 retail grocery establishments, out of which the appellee serves ten. The appellee services most of its customers in the usual wholesale-retail manner; however it serves 25 of its outlets in Oklahoma under a sublease agreement. Four of these are in the Tulsa area where the appellee also owns 4 stores either in whole or in part and serves two others stores in the traditional manner.

II.

The Sub-Lease Agreements:

These contracts are in the customary form for leases of retail stores premises. However, the form includes a

standard clause[1] that requires the retailer to purchase from the appellee 65 percent of the retailer's total monthly net sales and to participate in certain dealer services rendered by appellee. When the usual 20 percent mark up on groceries and the necessity for goods other than those sold by appellee are considered the effect of this requirement is that a sub-lessee is forced to purchase about 80 percent of his requirements from appellee.

In addition, the required services include a complete accounting system, an advertising program, central billing and store remittance services, etc. furnished by appellee at additional fees. Under the advertising program the independent retail managers of the sub-lessee stores meet at regular intervals to agree on what items will be placed in media advertising and the price that will be charged for each item.

Appellants contend that the appellee is able to exact these restrictive terms from sub-leasees by agreeing to finance the opening of new stores, contracting for fixtures, furnishing a line of credit, providing the initial stocking of merchandise and making premises available, all on a reimbursable basis. While there are other wholesale grocers who perform similar services to consenting retailers

---

1. "SERVICES AND REQUIREMENTS

"Sub-Lessee shall participate in all dealer services and programs provided by Sub-Lessor, including, but not limited to, store accounting service, Red Bud advertising, frozen food plan, sign rental and store remittance service. During the term of this Sub-Lease Contract. . . . Sub-Lessee shall purchase from Sub-Lessor, each month, so much of Sub-Lessee's merchandise requirements, including dry groceries, health and beauty aids, frozen foods, fresh produce, fresh and cured meats and other items purchased for resale, as shall equal in dollar volume, sixty-five percent (65%) of Sub-Lessee's total monthly net sales. If Sub-Lessee violates any of the provisions of this paragraph, Sub-Lessor, at its option, may cancel and terminate this Sub-lease contract."

frequently the merchant is unable to obtain financing without such terms. In the event a sub-lessee fails to perform the conditions of the lease the appellee then cancels it and forecloses. The record indicates one such instance being so handled. Another witness testified that she had been required to abide by the sub-lease requirements.

Appellant claims damages of $10,000 for loss of profits that they would have enjoyed from sales to appellee's sub-lessees but for the violations of the antitrust laws. They also claim specific damage of $884.01 which is the balance due them on an open account by a sub-lessee of appellee whom the latter had foreclosed and forced into insolvency. The jury returned a verdict for the appellee.

[*III. not designated.*]

IV.

Appellant's Contentions:

1. Appellant says that the sub-lease arrangement of the appellees is a *per se* violation of Section 1 of the Sherman Act under the rule of *Fortner Enterprises, Inc.* v. *United States Steel Corporation* [1969 TRADE CASES ¶ 72,757], 394 U.S. 495 (1969) and cases there cited. The Supreme Court has held that tying arangements—the sale of one product conditioned upon the purchase of another—are illegal. And that violations are *per se* provided a market leverage or control is present in the tying product and the market foreclosed is not *de minimus*. In *Fortner, supra,* the Court held that financial arrangements such as cash, credit, etc. may be the tying product and that sufficient dominance or economic control was present in the tying product even though it was effective "only with respect to some of the buyers" in the tied product. Here the appellant claims that the lease, financing, stocking of goods, etc.

was the tying product and that the 65 percent requirement together with the services were the tied one. The jury, however, found that the appellant did not meet the burden of his case under *Fortner*, i.e., neither the dominance nor control was present nor the effect *de minimus*. As much as we feel that contracts such as are under attack here are suspect, we must respect this finding of the jury on the basic facts necessary to support a *per se* violation. The instruction[2] of the court to the jury was quite sufficient advising in the very language of *Fortner* that the standard was not one of monopoly power or dominance throughout the market for the tying product but could be sufficient even though it exists as to some buyers and might be inferred from the tying product's desirability to consumers or uniqueness in its attributes.

2. Nor do we feel that the court erred in submitting the question to the jury. The proof is exceedingly weak, not only failing to show the extent of the market in automobile and accessory goods but being entirely silent on the effect of the sub-lessee agreement thereon. There is also affirmative evidence that tends to disprove these necessary elements. For example, there were only four of the

---

2. "The standard of sufficient economic power does not require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. The economic power over the tying product can be sufficient . . . even though the power exists with respect to some of the buyers in the market. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes * * * [U]niquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors. * * * Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied product, any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

sub-lease agreements in effect in the Tulsa area in a market that had over 400 stores; out of the 8000 items in the appellee's line only 14 were in the automobile accessory area; appellee had financed stores without the 65 percent requirement; and there were several other grocery wholesalers who were offering the same or a similar sub-lease arrangement. In our view the evidence was far too weak to support a directed verdict as the appellants requested.

3. Likewise we must conclude that the sub-lease was not an exclusive dealing contract which is illegal *per se* under Section 3 of the Clayton Act. The test is much more onerous than the one in tying arrangements. The exclusive dealing arrangement must be likely to foreclose competition in a substantial portion of the line of commerce affected. *Tampa Electric Co.* v. *Nashville Coal Co.* [1961 TRADE CASES ¶ 69,940], 365 U. S. 320, 327 (1961). We doubt if the evidence was sufficient to go to the jury, much less warrant a *per se* finding. However, the court submitted it to the jury under a fair instruction.[3] We cannot therefore, disturb the jury's finding on the § 3 Clayton Act claim.

4. Appellants also belatedly object to the form of the verdict[4] submitted to the jury and on which it acted. We

---

3. "Even though the contract and/or sublease is found to be an exclusive dealing arrangement, it does not violate Section 3 of the Clayton Act unless it is probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected."

4. "We, the jury, find the defendant did not violate Section 1 of the Sherman Anti-Trust Act and find for the defendant.

"We, the jury, find that the defendant did not violate Section 3 of the Clayton Anti-Trust Act and find for the defendant."

believe it the better practice not to request the jury to pass on the ultimate legal issue, see P. Areeda, Antitrust Analysis, 45 (1967), but here the appellants fully and specifically agreed to the form of the verdict and the instructions of the court were both clear and sufficient for the jury to understand completely what it was doing by its verdict. We cannot at this time say that it was error. See *Northern Pacific RR Co.* v. *Urlin*, 158 U. S. 271 (1895); *Joseph* v. *Rowlen*, 425 F. 2d 1010 (C. A. 7, 1970); *Western Fire Ins. Co. of Fort Scott, Kan.* v. *Ward, et al.*, 131 F. 2d 541 (C. A. 5, 1943); 49 A. L. R. 2d 1301 (1954).

5. As we have noted, there is evidence in the record that independent grocers and managers of the sub-lease stores under the advertising program would hold meetings to "decide" on prices to be charged on items selected for features treatment in advertising. Price fixing has long been held to be unlawful *per se* under § 1 of the Sherman Act, regardless of the amount of interstate commerce involved. *United States* v. *Socony Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 224 n. 159 (1940). Appellant did not allege nor submit his case on a price-fixing theory —either at the trial court or on appeal—and does not raise the point here. Nor is there any proof in the record of any price fixing on automobile accessory products. We mention this in passing since tying arrangements like those that call for exclusive dealings are suspect and when joined with any type of price fixing would be invalid without more.

6. Several additional claims as to the admission of evidence and other matters are without merit and we do not discuss them; nor do we, in view of our decision, reach the issues relating to damages.

The judgment is affirmed.

APPENDIX "C"—ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk
Denver, Colorado 80202

Howard K. Phillips
Clerk

Telephone
303-837-3157

October 22, 1971

Re: No. 322-70, Jimmy T. Smith, et al. vs. Scrivner-Boogaart, Inc.

Mr. Stan P. Doyle
Attorney at Law
P. O. Box 4470
Donaldson Station
Tulsa, Oklahoma 74104

Dear Mr. Doyle:

An order has been entered today in the above case denying appellants' petition for rehearing.

Yours very truly,

Howard K. Phillips
Clerk
By /s/ Helen R. Bartha
Helen R. Bartha
Deputy Clerk

hkp:hb

CC: Mr. Richard E. Hancock
Attorney at Law, 1302 Philtower Bldg., Tulsa, Oklahoma;

Mr. Jack R. Givens
Attorney at Law, 1700 Fourth Natl. Bldg., Tulsa, Oklahoma;

APPENDIX "D"—RELEVANT STATUTES

I. Sherman Act, Sec. 1 (15 USC Sec. 1).

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty

thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

II. Clayton Act, Sec. 3 (15 USC Sec. 14).

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

III. Clayton Act, Sec. 4 (15 USC sec. 15).

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in

controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

IV. Clayton Act, Sec. 12 (15 USC sec. 26).

§ 22. District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.

V. Clayton Act, Sec. 16 (15 USC sec. 26).

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

LIBRARY
SUPREME COURT, U. S.

No. 71-645

Supreme Court, U.S.
FILED
DEC 10 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

JIMMY T. SMITH, an Individual, and SMITH SALES COMPANY, a Corporation
Petitioners

VERSUS

SCRIVNER-BOOGAART, INC., a Corporation
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JACK R. GIVENS
1700 Fourth National Bank Building
Tulsa, Oklahoma 74119
Attorney for Respondent

WAYNE R. SCOTT CO. — TULSA, OK. 74120
507 S. QUAKER • (918) 587 7806

HARVEY SHARP — OKLA. CITY, OK. 73102
3111 CITY NATIONAL BANK TOWER • (405) 232-0963

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Supplemental Statement of Facts 2

Reasons for Denying the Writ 14

I: *The verdict and decision of the jury and trial court is in accord with prior decisions of this Court, as affirmed by a unanimous panel of the Court of Appeals, including an Associate Justice of the United States Supreme Court, retired, sitting by designation.* 15

II: *At best, only a de minimis effect on commerce was demonstrated under the sublease in question, the advantages of which far outweighed any adverse effect, and no substantial federal question is presented.* 21

III: *The dire consequences of the decision predicted by the Petitioners simply are not supported by the facts.* 27

IV: *The Petitioners attempt to infuse theories and issues in their Petition for Certiorari either not raised or litigated in the trial court, or claim errors to which objection was not made at the time of trial.* 32

A. Price Fixing 32

B. Exclusive Dealing 33

C. The Verdict Form 34

D. Evidence of Damage 35

Conclusion 39

CITATIONS

Cases: *Page*

Fortner Enterprises v. U.S. Steel Corp.,
394 U.S. 495, 89 S.Ct. 1252, 22 L. Ed. 2d 495 ..... 19, 20

Northern Pacific Ry. Co. v. United States,
356 U.S. 1, 78 S.Ct. 514, 2 L. Ed. 545 20

Northern Ry. Co. v. Miller,
(CA 6th 1962) 285 F. 2d 202 37

Orloff v. United States,
(CA 6th 1946) 153 F. 2d 292 37

United States v. Standard Oil Company,
221 U.S. 1, 33 S.Ct. 502, 55 L. Ed. 619 20

Western Fire Insurance Co. of Fort Scott,
Kansas v. Word, (C.A. 5th, 1942) 131 F. 2d 541 35

White Motor Company v. United States,
372 U.S. 253, 83 S.Ct. 696,
9 L. Ed. 2d 738 (1963) 27, 38

Whitney v. Acres, D.C. Okla. 1965, 247 F. Supp. 763 ... 35

Statutes

Section 4, Clayton Act, 15 U.S.C., § 15 22

No. 71-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

JIMMY T. SMITH, an Individual, and SMITH SALES COMPANY, a Corporation
Petitioners

VERSUS

SCRIVNER-BOOGAART, INC., a Corporation
Respondent

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is styled Jimmy T. Smith, an Individual, and Smith Sales Company, a corporation, Appellants, v. Scrivner-Boogaart, Inc., a corporation, Appellee, No. 322-70, and is reported 447 F. 2d 1014 and 1971 CCH Trade Cases §73,611. The decision of that Court denying Petition for Rehearing filed therein on October 22, 1971 was in brief letter form and is not separately

reported. It is accurately shown as Appendix C to the Petition herein, page A12.

JURISDICTION

The Petitioners have invoked jurisdiction of this Court under 28 U.S.C. §1254(1), praying for a writ of certiorari.

SUPPLEMENTAL STATEMENT OF FACTS

While there was a great deal of dispute as to the facts at the trial of this case which we will mention where important for the most part under our following separate reasons why this Court should not grant a writ of certiorari, nevertheless there are some statements contained in the Petitioners' preliminary statement of the case which call for a correction or elaboration at the outset.

To begin with, the evidence adduced by the Petitioners themselves reveals that the system of wholesaling under attack was developed in the United States in the 1920s and the 1930s as a means by which independent retail merchants could compete with the chain stores which at one point were rapidly driving smaller stores out of business. (R. 126-127). Under the system the wholesaler buys in largely carload lots, receiving quantity discounts for the same. Under the Scrivner-Boogaart program, which is similar to that of many others, cost to

the wholesaler is then increased 3% across the board plus 3/4 of 1% for freight upon sale to retailers. One of the principal advantages to the retail customer is the mass delivery twice-weekly on the placement of a single order to the wholesaler. This frees the merchant from having to deal with multiple salesmen or from increasing overhead by the addition of buyers for his store. (R. 107-108, 152, 155, 156, 226, 261, 269, 271). The retailers may also take advantage of a "central billing program" which allows them to receive goods *directly* from suppliers other than the defendant wholesaler at quantity discount prices, but the wholesaler guarantees the payment to the other suppliers, pays the same, and then collects from the retailer. Any *cash* discount afforded by the other suppliers (usually 2%) is taken by Scrivner-Boogaart as a consideration for this service (Pl. Ex. 33, R. 94).

In all, this system has resulted in the lowering of wholesale grocery mark-ups throughout the United States over the past forty years from 12% or 15% down to about 4%. The stores so operating are known in the industry as "voluntary wholesale groups". (R. 78, 85).

There also developed yet a third type of grocery wholesaler, competitive to both the chains and the voluntary wholesale groups, known as "co-ops", in which individual retail merchants own the wholesaler supplying them, and which likewise use quantity purchasing to

lower prices. In Tulsa, a co-op known as "Affiliated Foods" services Thrift-T-Wise Stores and AG Stores (R. 129, 144).

In the Tulsa area where there are in excess of 400 retail grocery outlets, Scrivener-Boogaart supplies 10 stores, of which number it owns either in whole or in part 4 stores. Of the remaining 6 stores, five have entered into a "sublease agreement" with the Respondent which is the subject of the attack in this lawsuit. Of the entire Tulsa area retail grocery sales, Scrivner-Boogaart-supplied stores account for only 1 to 2% (R. 156, 157, 158, 139, 140, 162, 234). The retail grocery market in Tulsa was partially divided according to one survey in 1969 as follows: Safeway 31%, Warehouse Markets 11%, Red Bud Stores 1%. (R. 222). Scrivner-Boogaart-supplied stores use a common name, "Red Bud Stores", for the most part.

In all, Scrivner-Boogaart supplies approximately 120 stores in the several states in which it operates, twenty-five of which are presently under the sublease agreement in question. (R. 139). The total sales of Scrivner-Boogaart during 1969 for its entire operation amounted to one-hundred ten million dollars, but only approximately 1/20 of 1% or $55,000 was represented in sales of products in which the Petitioners and Respondent actually competed. (R. 110, 96). For simplicity we shall refer to these type of products as "auto accessory products" throughout this brief. Of course, since only 5 stores, out of a total

of 120 stores supplied by Scrivner-Boogaart, had subleases and were involved in the Tulsa area, only a small portion of the annual total of $55,000 could have been involved in the Tulsa area.

The Petitioners on the other hand had total sales in 1969 of $447,000, of which approximately 65% or 75% was to grocery stores. (R. 189, 191, 205). Smith sells auto accessory parts to other outlets such as service stations, as well, but Scrivner-Boogaart does not. In the Tulsa area Smith services a total of approximately 70 to 80 outlets. (R. 206-207). His largest customer by far, however, is a chain store known as "Warehouse Markets" and his second largest customer during the entire period in question was the group of stores supplied by Scrivner-Boogaart, known as "Red Bud Stores". (R. 191-194). Smith's sales to Warehouse Markets represents about 95% of that chain's auto accessory product requirement, whereas Smith's sales to Safeway and other chains and to stores of the six other competing voluntary wholesale groups is nil. (R. 207). The Respondent carries between seven and eight thousand different items available for supply to retail merchants. Out of this number only a handful, about 14 in number, represent auto accessory products. (Pl. Ex. 18, R. 252). The Petitioner Smith carries approximately 400 different auto accessory products. The Red Bud grocery stores in question carry far less than 1% of their total inventory in auto accessory products,

from whatever source. (R. 96). Price lists showing a comparison between the Petitioners' and Respondent's competing products reveal several items wherein the Petitioners prices were better, and several items wherein the Respondent's prices were better. (Pl. Ex. 38, R. 246). In addition, the evidence disclosed that a third competitor had taken sales away from both the Petitioners and Respondent in certain instances because of generally lower prices. (R. 257). Though Smith Sales Company sales to Red Bud stores were lower in volume than to its prime customer, Warehouse Markets, nevertheless Smith's sales to Red Bud stores exceed those of Scrivner-Boogaart in the competing area and in fact Red Bud stores represented Smith's second largest customer! Smith frequently sold to Scrivner-Boogaart's wholly owned stores as well as to Red Bud stores operating under the sublease in question. (R. 150).

In the case of sublessees Scrivner-Boogaart arranges credit for them for buying of fixtures and the intial stocking of their stores by co-signing the obligations with the sublessees, and likewise takes the prime responsibility for the rental of the premises where the store is located. Frequently the independent merchant is unable to get such credit or lease the premises without such aid although Scrivner-Boogaart by no means is the only wholesale grocer through whom such assistance is available. (R. 158, 272). In the Tulsa area alone six similar programs are in operation. (R. 154, 158).

Against this background, the Petitioners commenced suit in August, 1967 alleging a loss of $10,000 because of foreclosure from sales to Red Bud stores, including specifically an alleged loss of $884.01 representing an uncollected sum for goods sold to one Red Bud store known as Fred's Red Bud No. 2 (later Seminole Hills) operated by a sublessee of the Respondent in Tulsa's first urban renewal project area, who had become insolvent and whose stock in trade was replevined by Scrivner-Boogaart under a security agreement in the District Court of Tulsa County, Oklahoma. (R. 169). On this occasion, Scrivner-Boogaart took not only a $36,000.00 loss on accounts due from the retail merchant but after attempting to operate the store itself (and while purchasing occasionally itself from Smith) closed the same because of lack of income, and continues to pay rentals on the empty building to the landlord under the prime lease in the amount of $1250.00 per month for an additional loss of $15,000.00 per year through the period ending in 1980, or the termination date of the original lease. (R. 135, 136).

At the trial of the action Smith produced only two store operators during his entire case in chief; one, Fred Latham, Jr., the former operator of the defunct Fred's Red Bud No. 2 store, and later-to-be business partner of the Petitioner Jimmy T. Smith himself, testified that he had received a letter cancelling his sublease for failure to comply with the provisions of the sublease requiring

65% of purchases to be made from the Respondent, Scrivner-Boogaart. The proof shows that this cancellation was made at the time of and in conjunction with the collection and replevin action brought by Scrivner-Boogaart, and upon advice of counsel in order to regain legal possession of the premises where the store was located as well as legal possession of the inventory itself under a security agreement, contrary to Smith's apparent assertion that the sublease was cancelled *before* the store was closed by replevin action as a means of chastizing Latham for dealing with Smith in violation of the requirements provision of the contract. (R. 135). As a matter of fact, Fred's Red Bud No. 2 was not, however, in violation of the 65% requirements clause, but instead had made purchases equaling 72% of its net sales but did not take issue with the Respondent's mistaken assertion in this regard (R. 115).

The other store operator testifying at the behest of the Petitioners was Carolyn Latham Swinson, former wife of Fred Latham, Jr., who was awarded Mr. Latham's interest in another Red Bud store known as Fred's Red Bud No. 1 in a divorce action which occurred in 1968. Although she testified that she had been obligated to abide by the provisions of the sub-lease at the time of taking over the store from her former husband, she had actually been excused from the advertising program and Scrivner-Boogaart had not said anything to her about the

65% requirement since taking over the store, (R. 177, 182) although she had not met the requirement to the date of trial (R. 115, 182). She further testified that she had been sued by Scrivner-Boogaart the month previous for past due rent in the sum of $3,400.00 and on open account for groceries in the sum of $21,000.00 and had on the Sunday night prior to her appearance in court closed the store she operated. (R. 183). Although Mrs. Latham claims that Roy Brandell, the Treasurer of Scrivner-Boogaart, told her on the occasion that Fred's Red Bud No. 2 closed that the creditors could "go to hell", Mr. Brandell denied this in plain English (R. 248), and whatever may be the importance of such a remark to this anti-trust action, even if it had not been denied, it is less than accurate to assert that it was an admitted "fact" in the trial of the action.

At page 4 of the Petition for Certiorari the Petitioners attempt to equate certain of their customers in size, location and customer type with the Red Bud Stores serviced by the Respondent. They then attempt to contrast the sales of $226,650. by Smith to one group of customers, to the $23,017 made by him to the Red Bud Stores which are serviced by both parties. This approach is fallacious on its face. In the first place he compares Warehouse Market No. 5 in Tulsa, being a store with 25,000 square feet and another Warehouse Market in Claremore, Oklahoma, to Seminole Hills Red Bud Store with

only 12,000 square feet. (R. 201). One store is double in size and the other is located in an entirely different city. Secondly, Smith was shown to have an almost exclusive monopoly in sales to the Warehouse Markets, being its principal supplier and it being a chain store, whereas the Red Bud Stores purchase supplies not only from Smith but from Scrivner-Boogaart and at least one other supplier (R 201, 257). In addition, whereas there were fifteen Warehouse Markets included within the total sales made by Smith, there were only five Red Bud markets subject to the sublease under attack and where any comparative figures were shown by the evidence. This apples-to-oranges comparison by no means stands as admitted by the Respondent.

And, while the Petitioners imply at page 5 of their Petition that the relevant market under consideration and in which the parties competed was one wherein the Respondent supplied twenty-five stores under the sublease in question, actually, the Petitioners own proof showed sales to only five of such twenty-five, all in the Tulsa, Oklahoma, area, and Petitioners did not even attempt to show any comparisons with sales if any, to the remaining twenty sublessees and other stores serviced by the Petitioners. (Pl. Ex. 21, R. 193).

The bald assertion contained on page 6 of the Petitioners' brief that "to buy from Smith, an independent retailer obligated to Scrivner-Boogaart must violate the

contract" is unsound. In the first place this is a conclusion reached by the Petitioners and by no means does it represent an undisputed fact in the case. On the contrary, we believe the facts clearly demonstrate that any merchant subject to the sublease requirements can freely deal with Smith to the extent that a grocery store can practically handle and sell auto accessory products and that the Petitioners' conclusion is basically erroneous. Since, under the sublease retailers had freedom to buy thirty-five per cent of net sales in products from other suppliers, such as Smith, which represented about 20% of their total inventory needs, the basic question arises as to whether or not Smith would *ever* be foreclosed from the retailers operating under the sublease since auto accessory products represent less than 1% of all sales, even in stores where the 65% clause was not complied with or enforced (and Smith presumably had complete freedom to sell to the same). The only evidence admitted at the trial tending to show the percentage of sales of auto accessory products is that shown by Plaintiffs' Exhibits 21A and 22 (R. 194, 117) which showed sales by Foodtown and Fred's Red Bud No. 1 (both stores having sublease clauses but not complying with the same) wherein both such stores purchased less than 1% of their total net sales from Smith.

The Petitioners at page 7 of their petition allude to "warnings" sent by the Respondent to retail customers

having a sublease and attempt to make more of one such incident than the facts warrant. The evidence shows only one such letter was sent, to Fred's Red Bud No. 1 in Tulsa, Oklahoma, but that no enforcement of the sublease requirement was sought at this store. A second letter, terminating a lease at another store was sent, but only after the same had defaulted in its obligations to pay the Respondent several thousand dollars in monies due and owing and *after* a replevin action had been started in State Court to collect the sums in arrears, which action closed the store in question. (R. 135). The letter was sent cancelling the lease on advice of counsel in order to regain legal possession of the premises where the store was located as well as legal possession of the inventory itself under the security agreement. (R. 135).

And of all the statements contained under the statement of facts in the Petition that ring most hollow is that contained on page 8 wherein it is asserted, "The reasonable inference that can be drawn from these facts is that Scrivner-Boogaart by foreclosing the security agreement was actually seeking to apply pressure on the competing wholesalers such as Smith — to keep him and other independent wholesalers from selling to the Scrivner sublessees." This inference is *not* reasonable and defies human nature and business judgment. As earlier shown, Scrivner-Boogaart upon foreclosure of its security agreement took not only a $36,000.00 direct loss on the account

due from the retail merchant in question, but after attempting to operate the store itself upon repossession (and while purchasing occasionally itself from Smith) closed the same because of lack of income, and continues to pay rentals on the empty building to the landlord under the prime lease in the amount of $1250.00 per month for an additional loss of $15,000.00 per year through the period ending in 1980, or the termination date of the original lease. (R. 135, 136). The conclusion reached by the Petitioners that all of this was suffered merely to put pressure on Smith is grossly farfetched; indeed, it is particularly unsound in view of the fact that not only did Red Bud merchants operating under the subleases in question continue thereafter to buy from Smith, but actually made greater purchases of auto accessory products from Smith than they did from Scrivner-Boogaart itslef, and even Scrivner-Boogaart's own stores thereafter continued to purchase such merchandise from Smith! And Petitioners would have the Court believe this in spite of the fact that the "market" Respondent was supposedly foreclosing amounted to only $55,000 per annum to all 120 Scrivner-Boogaart supplied stores. If a greater or more compelling example of throwing the baby out with the bath water exists we can not conceive of it.

Finally, although the Petitioners have alluded to a 100% purchase requirement clause in a financing agreement between the Respondent and said sublessee mer-

chants and to alleged price fixing that "came out at the trial", these matters form no part of their Complaint in this action, nor any part of their theory of recovery at the trial (See Petitioners' Trial Brief, page 1 "Theory of Plaintiffs' Case", R. 22-28). These matters were not a part of the Petitioners' requested instructions in the trial court, formed no part of their prayer for relief, and we do not deem them proper subjects for consideration in this Court, not having been raised or contended over at the trial.

REASONS FOR DENYING THE WRIT

I

The verdict and decision of the jury and trial court is in accord with prior decisions of this Court, as affirmed by a unanimous panel of the Court of Appeals, including an Associate Justice of the United States Supreme Court, retired, sitting by designation.

II

At best, only a de minimis effect on commerce was demonstrated under the sublease in question, the advantages of which far outweighed any adverse effect, and no substantial federal question is presented.

III

The dire consequences of the decision predicted by the Petitioners simply are not supported by the facts.

IV

The Petitioners attempt to infuse theories and issues in their Petition for Certiorari either not raised or litigated in the trial court, or claim errors to which objection was not made at the time of trial.

I

The verdict and decision of the jury and trial court is in accord with prior decisions of this Court, as affirmed by a unanimous panel of the Court of Appeals, including an Associate Justice of the United States Supreme Court, retired, sitting by designation.

It is apparent upon a close reading of the Petitioners' Complaint in the trial court and their Trial Brief (R. 2, 22), that their theory of recovery from the inception of this lawsuit and the principal thrust of their argument is that a *per se* violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act occurred. The Petitioners first of all contended that the independent retail merchant signing a sublease agreement with the Respondent requiring the sublessee to purchase an amount of inventory needs equal to 65% of "net sales" amounted to a tying agreement; i.e., merchants were forced to buy said percentage of their requirements and take the various Red Bud programs (the "tied" products) as a condition of obtaining financing and the sublease of the real estate

involved. In their brief, page 25, before the Court of Appeals, the Petitioners state that the tying product was the "financing extended" to the retailers; and they also argue that the real estate itself is a tying product.

In that brief, at page 27, the Petitioners stated:

> "In the present case Scrivner-Boogaart could have probably extracted the anti-competitive lease that required the independent retailer to buy exclusively from Scrivner-Boogaart by the uniqueness of a retail store location . . . Besides the uniqueness of the lease, Scrivner-Boogaart also used the extension of credit to the retailer as a device to gain the agreement."

However, the Petitioners in this case did not even attempt to prove that the Respondent had some type of dominance or economic power in either (1) money or (2) real estate, but instead relied on the *mere existence* of the agreements themselves as supporting their theory that a *per se* violation of the Sherman and Clayton Acts was involved. The record is clearly devoid of any proof of dominance or economic power over either money or real estate in the case at bar. The Petitioners, recognizing this, would ask that a new theory or extension of the anti-trust laws be accepted by this Court at this time. This is apparent from their posture in the Court of Appeals, where at page 25 of their brief there, they state:

> "However, when the agreements did exist, this is sufficient evidence that Scrivner-Boogaart had the requisite power."

They stated at page 32 of that brief:

> "A combination of *Northern Pacific, Fortner* and *Texaco* supports the conclusion that if the tying agreements existed then Scrivner-Boogaart must have had the power."

This Court has never taken the position the Petitioners would urge, and Petitioners fully appreciate this, because they state at page 32 in their brief in the appellate court below,

> "Still one is faced with the fact that the Supreme Court in the *Fortner* case did not make such a conclusion. It ordered the case remanded so that the Plaintiff could support by evidence the conclusion that U. S. Steel held a dominate position. . ."

There is not a single line of proof in the record of this case wherein the Respondent is shown to have either any dominant, compelling or unique power in the extension of credit to the independent retail merchants. As stated, the Petitioners did not even attempt to prove such a proposition. The only proof on the subject matter of financial credit available to the independent merchants at all was adduced by the Respondent and leads to a completely contrary conclusion. At page 150 of the record, Mr. Clinton, an employee of the Respondent, testified that Scrivner-Boogaart has financed or loaned money to some retail merchants where they do not have any kind of lease or sublease from Scrivner-Boogaart at all. And at page 129 of the record, Mr. Brandell, another employee

of the Respondent, testified that the various programs contained in the sublease agreement are extended to retail merchants who do not have subleases as well as to those who do have them. The record is also clear that the program offered by Scrivner-Boogaart with its sublease is similar to that offered by other competitors in Tulsa County such as the Fleming Stores and Affiliated, Hale-Halsell, Collins-Dietz, and "all wholesalers". (R. 144, 158). Also see the testimony of witness Larry Reasor (R. 272), wherein he indicated that at the time he was extended financing by Scrivner-Boogaart in connection with his non-sublease store, other financing was avilable.

With reference to the question of whether of not Scrivner-Boogaart had any dominance or economic power in supermarket site location or not, the proof was overwhelming that it did not. The direct testimony of Mr. Kirtley, the sales supervisor of Scrivner-Boogaart, showed that the Respondent when selecting a supermarket site had no kind of option or preference on any land nor did they own any in blocks which they had already lined up (R. 158). The witness, Frank Moskowitz, a real estate agent with long experience in commercial development in Tulsa County, Oklahoma, testified that he had located and identified eighty separate sites that had been zoned suitably for grocery store locations in Tulsa during essentially the period in question, and those sites were only those of five acres or more; perhaps another forty or

fifty were available in tract sizes of less than five acres. (R. 275-276). Mr. Moskowitz also testified that in the development of shopping center sites it was not customary nor had he ever known of a grocery or chain store going out and buying land or taking options or preferences on it prior to the intention to actually locate in the specific area. To the contrary, he said they "usually negotiate and are ready to go at the same time they negotiate, and they usually want the owner of the land to build for them". (R. 277).

In *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495, this court in discussing whether or not a tying agreement amounted to a violation of the Sherman Act stated, at page 505:

> ". . . The proper focus of concern is whether the seller has the power to raise price, or impose other burdens in terms such as a tie-in, with respect to any appreciable number of buyers within the market."

The court in reversing and remanding the case to the trial court after an improper disposition of the same on motion for summary judgment, allowed the plaintiff therein an opportunity to prove dominance or market power. In the case at bar, the Petitioners have already had their day in court and the opportunity to show dominance or market power, but have failed to do so, or even attempt to do so, and we believe under the rule of reason any incidental restraint caused by the sublease in question is

clearly "reasonable". See *United States v. Standard Oil Company*, 221 U.S. 1, 33 S. Ct. 502, 55 L. Ed. 619.

And under *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 545, the need to prove economic power sufficient to restrain free competition for the tied product in a tying agreement is made manifest. There, at page 6, this Court stated in referring to tying agreements:

> "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interestate commerce is affected . . .
>
> "Of course, where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item, any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

When the Petitioners argue that the decision of the lower court is in conflict with prior decisions of this Court, it is in fact arguing for an extension of those doctrines clearly apparent in *Fortner and Northern Pacific* that require *proof* or *showing* of economic dominance or

power in order to classify a tying agreement as an unreasonable restraint of trade. The Petitioners in effect admit that no decision of this Court has gone so far as to hold the mere existence of a tying agreement proof of such economic dominance or power, in and of itself, without more. Therefore, the Petitioners' argument that the decision of the trial and appellate court below are in *conflict* with the prior decisions of this Court is not well taken. The requirement of those courts that there be some showing of economic dominance or power was fully *consistent* with the prior pronouncements of this Court, but the Petitioners did not avail themselves of the opportunity presented to them in their day in court.

Furthermore, the decision of the trial court was unanimously affirmed by a panel of the Court of Appeals, which included Associate Justice Tom Clark, retired, sitting by designation, who, of course, has participated in many of the leading anti-trust cases decided by this Court, and who wrote the opinion below.

II

At best, only a de minimis effect on commerce was demonstrated under the sublease in question, the advantages of which far outweighed any adverse effect, and no substantial federal question is presented.

One of the striking circumstances of the case at bar is the origin and amount of the Petitioners' only specific claim of loss presented in the trial court. Petitioners' claim a specific loss of only $884.01 by virtue of a non-collectible account owing Petitioners by one of the retail merchants supplied by Scrivner-Boogaart whose business failed and who likewise failed to pay the Respondent some $36,000 due on account because of his insolvency. While the trial court refused to submit this particular item of loss to the jury for its consideration, the Respondent having argued that it represented merely a loss caused to the Petitioners by virtue of their standing as a creditor and not because of any violation of the anti-trust laws, the appellate court did not reach this particular issue in view of its decision on the other matters presented in the case. The Petitioners also asserted general damages allegedly resulting from a foreclosure of the market and in all prayed for $10,000, which they asked to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C., §15. Thus, from the outset the case has been pitched in a rather low key compared with many of the prior anti-trust matters considered by this Court. And the proof adduced at the trial tending to show the amount of any foreclosure was fully consistent with the Petitioners' modest claim of loss in the first instance.

Although there was evidence that Scrivner-Boogaart's

sales of *all grocery products* to stores operating under the questioned sublease had risen during the period 1966-69 from $1,064,631 to $2,349,923 (Def. Ex. 16, R. 236), there was no evidence introduced indicating that Scrivner's share of the auto accessory products market during that period had any significant rise. In fact the only evidence in the case indicates to the contrary. It is to be noted from Defendant's Exhibit No. 17 (R. 239) that in the example of Fred's Red Bud No. 2 during the period from its opening until October 15, 1966, Scrivner-Boogaart supplied the store with only $243.70 in automotive accessory products (in fact, only an initial stocking of anti-freeze) whereas Smith made repeated small sales to the company to the day of its closing for a total of $2,884.00, or more than ten times the sales of the Respondent. Likewise we note on Defendant's Exhibit No. 19 (R. 239) for the calendar year 1966 Scrivner-Boogaart sold in the way of anti-freeze and motor oil to *all* customers, everywhere, some 120 stores, a total of only 1,405 cases. This averages only a little over ten cases of all products to each store for the entire year. Extrapolating this number of cases against the selling prices listed on the exhibits (Def. Ex. 19, R. 239) and adding 4% for markup and freight, we note that Scrivner-Boogaart's sales of products competing with Smith's products in 1966 amounted to only $9,586.19, itemized as follows:

Product	Cases Sold	Selling Price	Sales	Mark-up and freight (4%)	Totals
Xerex Anti-Freeze	396	$9.60	$3,801.60	$152.06	$3,953.66
Havoline Motor Oil (20 wt.)	326	$7.10	$2,314.60	92.58	$2,407.18
Havoline Motor Oil (30 wt.)	283	$7.10	$2,009.30	80.37	$2,089.67
Double Eagle Oil (30 wt.)	400	$2.73	$1,092.00	43.68	$1,135.68
					$9,586.19

Thus, Scrivner-Boogaart's automotive products sales totalled less than $10,000, on which its profit, even counting a 2% discount for cash payment to suppliers was less than $500! In the same year, Smith, in his first year of operations, sold $97,586.25 in competing products.

Considering that Scrivner-Boogaart's total share of the entire grocery market in Tulsa is probably less than 2%, we can see why the court and jury could very well conclude that this entire case represented a tempest in a tea pot. (R. 140).

The undisputed proof indicates that in 1969 only 1/20th of 1% of the total sales of Scrivner-Boogaart, or about $55,000, was represented in sales of automotive accessory products to stores *everywhere*. (R. 78, 132). Assumming an across the board average per store, something in the total magnitude of $5,000 per year of these products was sold *in the Tulsa area* by the Respondent. This should be contrasted with the Petitioner's total sales of products in 1969 of $447,000, 60% of which was in the Tulsa area.

If any foreclosure resulted, it was de minimis. Nor do we believe that this Court would see the matter differently. No important Federal question exists for this Court to decide.

Even if a question of de minimis damages were not involved, it is apparent that the subleases questioned and the buying requirements provision thereof have served to bestow great benefit on the public and the retail merchants involved and this Court may feel itself assured in refusing a writ of certiorari that this is not a situation or arrangement lacking in redeeming virtues. At least twenty-six specific benefits of the sublease and wholesaler's program were shown by the evidence adduced by the Respondent in the trial court. See Defendant's Exhibit No. 73 (R. 247) which lists the following advantages:

a. Access to good supermarket locations
b. Ability to obtain financial support for building construction
c. Store engineering services for market surveys, store design, equipment procurement, etc.
d. Assistance in initial stocking of merchandise in the store.
f. Assistance in advertising programs at a price he can afford.
g. Access to a trading stamp program if he should choose that method of sales promotion.
h. Assistance in obtaining cooperative advertising allowances from manufacturers.
i. Availability of accounting service at a reasonable price.

j. A ready source for current market information.
k. Periodic merchandising aid from grocery, meat, and produce specialists.
l. Access to private label merchandise.
m. Availability of a reliable low-cost source of supply of merchandise.
n. An efficient, convenient method of ordering provided by that supplier.
o. Elimination of salesmen — which allows the owner time to manage and to greet his customers.
p. Merchandise deliveries in large quantities on a specified time schedule.
q. A low out-of-stock condition.
r. New items evaluated and stocked promptly.
s. Competitive price checks.
t. Suggested retail prices available.
u. Computer generated invoices with zero errors in extensions and footings.
v. Computations of "going-in-gross" on grocery invoices.
w. Assistance in planning and financing store remodelling.
x. Assistance in selection or acquisition of store personnel.
y. Assistance for successful operators in the acquisition of additional locations.
z. Availability of group health and accident coverages and assistance in obtaining casualty and robbery insurance at favorable terms.

In the case at bar, the Petitioners have sought on a showing of very little more than that the agreements existed, to declare them illegal *per se* without that kind of searching judicial exploration of the consequences

such a holding might entail. See *White Motor Company v. United States*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963). On the scant showing made by the Petitioners, amounting to no more than de minimis damages, they would have this court declare void a system of merchandising that has developed over forty years, and without any evidence to the contrary was shown to be a principal means by which the stemming of the tide of grocery chain monopolization had been curtailed. See testimony of the witness Brandell (R. 126-127).

III.

The dire consequences of the decision predicted by the Petitioners simply are not supported by the facts.

Petitioners have at page 21 of their Petition unabashedly stated:

> "Unless the Scrivner-Boogaart subleases are declared illegal, petitioner is foreclosed from virtually all of the retail grocery market."

This is indeed an impressive claim. But there could be no more telling refutation of this assertion than the history of the financial success of Jimmy T. Smith, Petitioner in this action, as evidenced by the proof adduced at the trial of this case.

Unlike that host of anti-trust cases wherein the plaintiffs claimed ruinuous consequences from the activities

of the Respondents, Jimmy T. Smith and Smith Sales Company, enjoyed a prosperous ascendancy in the auto accessory products market in Tulsa County during the period in question. During the four year period 1966-69 which became the essential period in question during the trial, Smith's sales and profits (the latter generated at a gross margin of about 12% of sales) amounted to the following (Def. Ex. 30, R. 246):

Year	Sales	Gross Profits
1966	$119,000.00	$13,814.00
1967	$293,000.00	$17,029.00
1968	$319,000.00	$39,537.00
1969	$447,000.00	$56,591.00

A court and jury could very well conclude from this evidence, coupled with Smith's increase in sales to Red Bud Stores over the same period, that Smith had suffered no damage. Plaintiff's Exhibit 21A (R. 195) shows that increasing trend of sales by Smith to Scrivner supplied stores for the years in question, as follows:

Year	Sales
1966	$13,731.56
1967	20,688.91
1968	28,942.46
1969	23,017.00

The small drop in the last year may be accounted for by the complete closing down of Seminole Hills Red Bud Store (successor to Fred's No. 2) in 1968, by Rolling Hills switch to Park Oil Co. because of the price differen-

tial more favorable than either Smith or Scrivner-Boogaart (R. 257) and by Whittaker's Red Bud (Sapulpa) completely dropping oil products from its inventory (R. 265).

Although the Petitioners have throughout the case attempted to equate the partial requirements clause of the sublease to an *exclusive* dealing contract, the testimony in this case fails to support that position. Mr. Don Spoon, the operator of the Rolling Hills store, which had subleased from Scrivner-Boogaart, stated flatly that there had never been a situation where he could not have purchased from an outside supplier because of the limitations of the requirement clause (R. 258); Mr. Spoon stated that he purchased regularly from Parks Oil Co., an outside supplier; Fred Latham, Jr., the operator of Foodtown, an all night convenience store, bought large quantities of automotive accessory products from Smith, as did Fred's Red Bud No. 1, and for that matter Fred's Red Bud No. 2 prior to its becoming insolvent.

In fact, a close look at Plaintiffs' Exhibits 21A and 22 and Defendant's Exhibit 16 (R. 195, 117, 236) reveal that during the year 1969 with respect to stores where the 65% clause was *not* complied with or enforced (and Smith presumably had complete freedom to sell to the same) he sold less than 1% in automotive accessory products out of the total retail sales made by those stores during the years in question. These were:

Store	Total Retail Sales	Smith's Sales to Store	Percent of Smith's Sales to Total Net Sales
Foodtown	$1,532,514.00	$14,271.00	00.93
Fred's Red Bud No. 1	$ 968,796.00	$ 8,745.00	00.91

Furthermore, although there was evidence that Scrivner-Boogaart's sales of all grocery products rose, as we earlier mentioned, there was no evidence introduced indicating that Scrivner's share of the auto accessory products market during this period had any significant rise. (Def. Ex. 17 and 19, R. 239). Actually, the evidence disclosed that prices established by Smith and Scrivner-Boogaart were basically competitive. On the price comparison shown in Plaintiffs' Exhibit 25 (R. 254) Scrivner-Boogaart had a lower price on two of the items (Champlin CMO and STP Gas Treatment). On Zerex a large difference apparently in Smith's favor is due to the Petitioners' error in reading Scrivner's order book. He attempts to compare the price of cases of quarts with cases of gallons. Several other items were sold by both Smith and Scrivner but were excluded by Smith in his comparison and are shown on Defendant's Exhibit No. 38 (R. 246). These were taken from sales made in 1969; no cash discounts are shown in favor of Smith on these items but even granting them Scrivner still has established a better price on all five items, namely:

Products	Smith's Price	Scrivner's Price
12 — 8 oz. J-Wax Kit	$ 8.40	$ 6.525
12 — 12 oz. J-Wax Kit	$14.86	$11.205
12 — 16 oz. J-Wax Kit	$16.60	$14.027
12 — 16 oz. Car-Nu	$ 7.78	$ 5.782
12 — 13 oz. Vinyl Top Cleaner	$ 7.80	$ 5.872

It is interesting to note that on the last five items Scrivner-Boogaart's markup is 3¾% whereas Smith's markup varies from 22¾% to 37½%.

Thus on the thirteen items compared at the trial of this lawsuit, Scrivner's price was better on seven items and Smith's price was better on six items.

Mr. Don Spoon, the operator of Rolling Hills Red Bud, a store with the questioned sublease, and co-owner and operator of Meadowood Red Bud (owned 51% by Scrivner-Boogaart) chose to use neither Mr. Smith nor Scrivner-Boogaart as his source for auto accessory products because a third competitor could outdo them both. (R. 257-258).

Thus the dire consequences which the Petitioners say will result from a denial of the writ of certiorari are completely contrary to what has transpired in the past. Any foreclosure of Mr. Smith from the market place is a foreclosure resulting from better service or better prices. He has sold more to the stores in question than Scrivner-Boogaart itself. He has had increasing sales to such sublessees during the period in question. And Scrivner-

Boogaart's share of the competitive market has not significantly risen, amounting to merely $55,000 in some 120 stores, only twenty-five of which have the subleases in question, and in only four of these has there been competition between the parties to this suit.

IV

The Petitioners attempt to infuse theories and issues in their Petition for Certiorari either not raised or litigated in the trial court, or claim errors to which objection was not made at the time of trial.

A. Price fixing: Petitioners in their Complaint did not allege price fixing by the Respondent nor did they assert the same in their Trial Brief as a theory of recovery. (R. 2, 22). Further, the Petitioners requested no instructions on the same. The sole feature having any suggestion of price fixing came in a very brief explanation of the Red Bud advertising program at record, page 89. There the witness Brandell testified that a newspaper ad was prepared by the advertising department of the Respondent; that the retailers select the products that will be included in a particular layout at a meeting at noon one day a week; that the prices are decided upon by the group, usually, but there are some that are left open until the last minute be-

fore the ad is to be placed and that one of the Respondent's field counsellors in Tulsa is at such meeting.

As the Court of Appeals, in its opinion, pointed out, there is no proof in the record of any price fixing on automobile accessory products and the Petitioners did not allege or submit their case on a price fixing theory — either at the trial court or on appeal — and it would be highly inappropriate and inequitable to the Respondent to chart this new and different claim at this stage of the proceedings.

B. Exclusive dealing: Although one of the agreements executed by the Respondent and a retail merchant (Pl. Ex. 7, R. 99) contained a clause purporting to require the retailers to purchase all of the owner's merchandise requirements from the Respondent to the extent that it could furnish the same, the original Complaint in this action did not mention the same but alleged that the sublease in question containing the 65% requirements clause was the offending contract. Nor did the Petitioners' Trial Brief stating their "theory of the case" complain of the former agreement, nor was there requested instruction pertaining to the same, or argument against it before the jury. There is no suggestion, either, by the Petitioners that there was every any correspondence about or attempts to enforce this requirement; indeed, it would be contrary to the more liberal terms of the sublease and we believe therefore inoperable as against any particular

retailer. Infusion of this particular contract into the consideration of the case at this stage would be to give it an importance that it has never had in the litigation and to inject a new issue for consideration for the first time.

C. The verdict form: The Petitioners also complained that the court submitted an improper verdict form to the jury. They claimed that this, among other claimed errors, amounted to such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Petitioners did not always have this view of the verdict form. In fact Petitioners' counsel affirmatively agreed to the form of this verdict as reflected by the following exchange found at page 299 of the record:

> "The Court: Wait a minute. Here it may be. 'We, the jury, find that the —' here it is. 'That the defendant violated Section 3 and Section 1 of the Sherman Anti-Trust Act and find for the plaintiff and assess their damages —'
>
> Mr. Doyle: Right.
>
> The Court: That the third one, now.
>
> Mr. Doyle: Yes, sir.
>
> The Court: So let me see all three of them.
>
> Mr. Givens: Yes.
>
> The Court: Now, let me see the three all together there.
>
> All right, now, this is for — all right, now, this would be the plaintiff side, all three.

Mr. Doyle: Yes, sir, and there is the defendant's.

The Court: Fine. Is that agreeable?

Mr. Doyle: Yes, Your Honor.

The Court: All right, fine.

Mr. Doyle: Thank you, Your Honor."

See *Whitney v. Acres* (D.C. Okla. 1965), 247 F. Supp. 763 where certain surplus language in the verdict was brought to the attention of the plaintiff's counsel before the jury was discharged but was not objected to and such action was held to be a waiver of any claim that the verdict was thus void. See also *Western Fire Insurance Co. of Fort Scott, Kansas v. Word* (C.A. 5th, 1942) 131 F. 2d 541, where there was deemed to be a waiver of any error in the form of a verdict when the complaining party did not object at the trial, even though the verdict form did not state the amount due the plaintiff.

While the form of the verdict might have been in different language, surely both the trial court and counsel for the Respondent should be fully entitled to rely upon an affirmative approval of a verdict form by opposing counsel in the trial of the case. This Court should not be asked to grant a writ of certiorari to seek a review of that form at this stage.

D. Evidence of damage: The Petitioners also complain that the trial court overstepped the bounds of propriety in a comment on the evidence which Petitioners

claim had the effect of excluding certain market comparisons from consideration by the jury. Over the objection of the Respondent, the trial court had *admitted* certain evidence pertaining to estimates of sales that the Petitioners felt they could have made but for the sublease in question. The pertinent part of the testimony was as follows (R. 202):

"Q. Now, considering the size and location of Fred's No. 2, and based upon your experience with these Warehouse Markets in this same general area, can you estimate how much you could have sold to Fred's No. 2 from 1966 to 1969 if the market had been free?

A. Yes.

Mr. Givens: I object to that question, Your Honor, and the answer to it. It's highly speculative.

The Court: It is highly speculative but I will tell the jury that it is. Go ahead.

Q. (by Mr. Doyle) What is that estimate?

A. That estimate is roughly $50,000.

The Petitioners contend that the comment of the trial judge (to which they did not object, nor did they move to strike) amounted to exclusion of the evidence from consideration by the jury when coupled with the instruction that the jury should disregard all evidence which is speculative in character. (R. 292).

The real thrust of the Petitioners' assertion of error in this regard is that the court somehow improperly or

prejudicially commented on the quality of evidence that was in fact admitted over the objection of the Respondent. It appears that under Rule 61 of the Rules of Civil Procedure this was at most harmless error, not affecting the substantial justice of the verdict and judgment in the case. Where there is no objection to an improper comment by the court or the objection is not timely, it should not be considered on appeal. See *Northern Ry. Co. v. Miller*, (CA 6th 1962) 285 F. 2d 202. Furthermore, a judge may give his opinion of the evidence in the trial, even in a criminal case, if he clearly instructs the jury that the determination of guilt is in their exclusive province. See *Orloff v. United States*, (CA 6th 1946) 153 F. 2d 292.

Thus the Petitioners seek review by writ of certiorari of what appears to be anything but an important federal question and one of the type of matters in which the trial courts have a great deal of discretion and in which the Court of Appeals found no merit at all.

E. Sublease advantages: Petitioners' claim that the trial court erred in admitting evidence of certain advantages or benefits that retailers enjoyed under the Scrivner-Boogaart subleases and voluntary wholesale program. Although this is one claim of error raised in the trial court their argument does not appear to deny that the twenty-six items mentioned are indeed advantages, but merely that in an anti-trust case the de-

fendant should not be entitled to justify its business procedures where a *per se* violation is claimed. This, of course, begs the question. We have never understood the decisions of this Court as prohibiting consideration of the redeeming virtues of particular contracts or business arrangements in determining whether a claimed restraint of trade is unreasonable or not under the Sherman Act. Certainly, in cases such as *White Motor Company v. United States*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963) this Court has announced its concern for the possible advantages that a particular business arrangement may have. There, at page 263, the Court in discussing whether or not a vertical territorial limitation might constitute a naked restraint of trade stated,

> ". . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack any redeeming virtue' and therefore should be classified as *per se* violations of the Sherman Act."

Thus, the Petitioners seek review of the judgment below partly on the grounds that the trial court permitted the Respondent to introduce evidence of the advantages or benefits of its business arrangement, under the claim that it was erroneous to do so in view of the clearly *per se* character of the violation charged. However, this overlooks the decisions of this Court indicating that it *must* examine the full scope of the defendant's activities to

determine whether or not a *per se* violation does in fact exist. In essence, the Petitioners argument is no more than another way of stating that under all of the evidence submitted *by them* there could be no doubt that a *per se* violation existed and that it was therefore unnecessary for the court to consider the favorable impact of the subleases on commerce. This argument is merely cumulative to the principal argument of the Petitioners that there is a conflict in the decision of the court below and prior decisions of this Court; it does not amount to a proper argument that the trial court so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

There is no conflict in the decision below and prior decisions of this Court; no substantial federal question is involved and only a matter of de minimis damage was presented for consideration in the trial court; the Petitioners seek to advance new theories or claims of errors not raised in the trial court, and a writ of certiorari should not therefore issue in the case at bar.

Respectfully submitted,

JACK R. GIVENS
1700 Fourth National Bank Building
Tulsa, Oklahoma 74119
Attorney for Respondent